STATE OF MICHIGAN

COURT OF APPEALS

LAURA FRYZ, Personal Representative for the Estate of JOSEPH M. MAMROCTSKI, Deceased, TONYA MAMROCKTSKI, Conservator for the Estates of BRETT MAMROCTSKI, and JOSEPH MAMROCTSKI,

Plaintiffs-Appellants/Cross-Appellees,

v

ROCK-WAY, INC., and RODNEY J. DUNKLEY,

Defendants-Appellees/Cross-Appellants.

UNPUBLISHED
November 2, 2004

No. 247166
Wayne Circuit Court
LC No. 00-036604 NI

Before: Donofrio, P.J., and White and Talbot, JJ.

PER CURIAM.

Plaintiffs, Laura Fryz, personal representative for the estate of Joseph M. Mamroctski, Tonya Mamroctski, Brett Mamroctski, and Joseph Mamroctski Jr. appeal as of right from a September 18, 2002 judgment in favor of plaintiffs in this automobile negligence/wrongful death case. On appeal, plaintiffs argue that the jury's verdict is against the weight of the evidence and claim error in certain evidentiary and instructional rulings. Specifically, plaintiffs claim that the circuit court abused its discretion by excluding the testimony of the last treating physician to examine the deceased, Joseph M. Mamroctski, that the circuit court overly restricted plaintiffs' counsel's examination of Terry Clay, the circuit court abused its discretion by refusing to allow the jury to rehear the testimony of a particular eyewitness, and finally by denying plaintiffs' motion for additur. Defendants in turn cross-appeal, arguing that if this Court remands this case for a new trial, plaintiffs' should be precluded from referencing a statement made by defendant Rodney J. Dunkley to defendant Rock-Way's insurance company. Because the record does not support plaintiffs' arguments, we affirm and do not reach defendants' cross-appeal.

The accident at issue in this case occurred on the morning of November 1, 2000 when a collision occurred on Eureka Road between Mamroctski and Dunkley. Dunkley, an employee of Rockway, Inc., was in a tractor-trailer, and began to turn left onto Eureka Road from where the truck was positioned on West Periphery. The first trailer partially blocked the center turn lane and left-hand lane of westbound traffic and the second trailer partially blocked the right-hand

lane of westbound traffic while Mamroctski approached on Eureka Road in his truck. Mamroctski's vehicle collided into the back end of the first trailer and the front end of the second trailer of the tractor-trailer in the left-hand westbound lane of Eureka Road. The damage to Mamroctski's pickup truck was extensive and the police used the jaws of life to free Mamroctski from his vehicle. Mamroctski suffered serious injuries requiring constant nursing care including a spinal cord injury causing paralysis.

On the morning of December 24, 2001, almost fourteen months after the accident, a nurse's aid discovered Mamroctski had died in his sleep. The autopsy report stated that Mamroctski died from dilated cardiomyopathy precipitated by obesity, noting that Mamroctski weighed 454 pounds at the time of his death. The autopsy also stated that Mamroctski had florid pulmonary edema, otherwise known as fluid in the lungs, which was attributed to Mamroctski's failing heart. Ultimately, the autopsy characterized Mamroctski's death as natural because the factors that were the result of his own pre-accident physical conditions were more significant in causing his death than was the accident itself. It was plaintiffs' position that Mamroctski died of congestive heart failure precipitated by multiple complications due to injuries he sustained in the motor vehicle accident at issue, and the surgical and medical treatment that followed.

After a three-week trial, the jury resolved the disputed facts and concluded that both drivers were at fault. The jury apportioned 55.5% fault to Dunkley, 44.5% fault to Mamroctski, and assessed damages in the amount of $155,000 for Mamroctski's injuries, in addition to $28,750 for his sons' loss of companionship and services. The jury rejected plaintiffs' claim that Mamroctski's death thirteen months later was caused by the accident. It is from this verdict that plaintiffs appeal and defendants cross-appeal.

Plaintiffs first argue that the jury's verdict, assigning 44.5% comparative negligence to Mamroctski, is contrary to the overwhelming weight of the trial proofs and that the circuit court committed an abuse of discretion by denying plaintiffs' motion for new trial. Plaintiffs contend that Ronald Dunkley, the driver of the tractor-trailer involved in the accident was solely responsible for causing the accident at issue, and therefore the jury could not reasonably find Mamroctski 44.5% comparatively negligence. Plaintiffs offer Dunkley's driving record as evidence indicating he was unqualified to work with commercial trucking vehicles and also argue that Dunkley's own admissions place the blame of the accident on himself. Plaintiffs also challenge defense expert Robert Miller's testimony as baseless and unfounded.

This Court reviews a trial court's decision on a motion for new trial for an abuse of discretion. *Morinelli v Provident Life & Accident Ins Co*, 242 Mich App 255, 261; 617 NW2d 777 (2000). Substantial deference is given to the trial court's determination that the jury's verdict was not against the great weight of the evidence. *Id.* An appellate court may overturn a jury's verdict based on the great weight of the evidence "only when it was manifestly against the clear weight of the evidence." *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 194; 600 NW2d 129 (1999).

A new trial may be granted if the verdict is against the great weight of the evidence. MCR 2.611(A)(1)(e). In deciding whether to grant or deny a motion for a new trial, the trial court's function is to determine whether the overwhelming weight of the evidence favors the losing party. *Phinney v Perlmutter*, 222 Mich App 513, 525; 564 NW2d 532 (1997). This Court and the trial court should not substitute their judgment for that of the jury unless the record

reveals that the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *Ellsworth, supra,* 236 Mich App 194.

Plaintiffs' argument that the great weight of the evidence supports that Dunkley was solely responsible for the accident, and that he was most certainly more than 55.5% responsible ignores that there was competent evidence to the contrary. The jury was presented with both eyewitness testimony and physical evidence regarding the eighteen-wheel tractor-trailer driven by Dunkley. The acceleration tests performed by defense expert Robert Miller and the testimony of eyewitness Terry Clay support the conclusion that such a massive vehicle cannot simply "dart" out inconspicuously into oncoming traffic. Donna Hollandsworth, another eyewitness, testified that the lights on Dunkley's tractor-trailer were illuminated and the reflective tape was visible and could be seen from a distance.

Plaintiffs also challenge the testimony offered by defense expert Robert Miller arguing that his reconstruction of the accident was based on "a pack of groundless, wildly conjectural assumptions" and should not have been relied upon by the jury. Plaintiffs specifically criticize Miller's time and distance calculations as unsupported by fact, rendering his opinion of "negligible weight" and therefore, the trial court abused its discretion by denying plaintiffs' motion for new trial.

Contrary to plaintiffs assertions, our careful review of the record reveals that Miller's opinions and conclusions were based on his direct inspection of the vehicles involved in the accident and upon his independent measurements and observations taken at the scene of the accident. Miller visited the scene of the accident numerous times to record lighting conditions, traffic flow, and various measurements. The acceleration tests performed were conducted under a plaintiff-favorable view of the facts to determine the minimum time that Dunkley could have been in the intersection prior to the accident. Ultimately, Miller concluded that Mamroctski had ample time and distance to take notice of Dunkley's tractor-trailer and to slow down or stop to avoid a collision.

Plaintiffs had full opportunity to object during the direct examination of Miller, and did object many times to various portions of his testimony. Plaintiffs also cross-examined Miller regarding both his findings about the accident and the methodology he employed to arrive at his conclusions. We recognize the trial court's unique opportunity to observe the witnesses, as well as the factfinder's responsibility to determine the credibility and weight of trial testimony. *Zeeland Farm Services, Inc v JBL Enterprises, Inc*, 219 Mich App 190, 195; 555 NW2d 733 (1996).

After reviewing the record as a whole, we conclude that the jury's verdict was not against the great weight of the evidence, but rather was premised on credibility and weight assessments that the trier of fact resolved while coming to its ultimate conclusion. In other words, because the jury as the trier of fact was in the best position to resolve the disputed facts, we will not substitute our judgment for that of the fact finder. *Ellsworth, supra,* 236 Mich App 194. Because the evidence does not preponderate so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand we will not disturb the jury's verdict, and find that the trial court did not err when it denied plaintiffs' motion for new trial. *Id.*

Next, plaintiffs argue that the circuit court abused its discretion by excluding the testimony of Dr. Riley Rees, M.D., the last treating physician to examine Mamroctski days before his death. Decisions regarding an expert's qualifications and decisions regarding the admissibility of an expert's testimony are reviewed for an abuse of discretion. *Tate v Detroit Receiving Hosp*, 249 Mich App 212, 215; 642 NW2d 346 (2002). Like other evidentiary issues, the admissibility of the expert's testimony are within the trial court's sound discretion and will not be reversed on appeal absent an abuse of that discretion. *Franzel v Kerr Mfg Co*, 234 Mich App 600, 620; 600 NW2d 66 (1999).

Prior to trial defendants moved to preclude the testimony of Dr. Riley Rees in connection with the cause of Mamroctski's death arguing that Rees was not qualified to opine on the issue because he was a plastic surgeon without any expertise in cardiac medicine. Plaintiffs argued that a general practitioner may be qualified to render an opinion concerning cause of death especially since Dr. Rees treated Mamroctski and was a aware of attendant cardiological complications. The trial court issued a bench ruling granting defendants' motion concluding:

> You didn't give me anything that convinced me that a plastic surgeon who deals with decubitus ulcers could testify as to a cause of death. To say that the decubitus ulcer caused his death, I think you need somebody who's got the expertise that could say that. A pathologist could testify to it. An infectious disease person could testify to it. A plastic surgeon, no.

On appeal, again, plaintiffs maintain that Dr. Rees is a qualified expert witness to opine on Mamroctski's cause of death and state that the admission of his testimony would have established a logical sequence of cause and effect between the accident and Mamroctski's death. Plaintiffs highlight Dr. Rees' professional background and experience treating patients with paralysis, and the fact that Dr. Rees was the last treating physician to examine Mamroctski prior to his death. Furthermore, plaintiffs argue that any limitations concerning Dr. Rees' qualifications are matters of weight rather than admissibility and such determinations should rest with the trier of fact.

The qualification of a witness as an expert, and the admissibility of his testimony, are in the trial court's discretion and will not be reversed on appeal absent an abuse of that discretion. *Mulholland v DEC Int'l Corp*, 432 Mich 395, 402; 443 NW2d 340 (1989). Further,

> [p]ursuant to MRE 702, the trial court is required to determine the evidentiary reliability or trustworthiness of the facts and data underlying an expert's testimony before that testimony may be admitted. To determine whether the requisite standard of reliability has been met, the court must determine whether the proposed testimony is derived from recognized [medical] knowledge. To be derived from recognized [medical] knowledge, the proposed testimony must contain inferences or assertions, the source of which rests in an application of [medical] methods. Additionally, the inferences or assertions must be supported by appropriate objective and independent validation based on what is known, e.g., scientific and medical literature. [*Spect Imaging, Inc v Allstate Ins Co*, 246 Mich App 568, 578-579; 633 NW2d 461 (2001) citing *Nelson v American Sterilizer Co (On Remand)*, 223 Mich App 485, 491-492; 566 NW2d 671 (1997) and *Tobin v Providence Hosp*, 244 Mich App 626, 646-647; 624 NW2d 548 (2001).]

We recognize, as plaintiffs contend, that Michigan endorses a broad application of the requirements in qualifying an expert, *Mulholland, supra*, 432 Mich 403-404, and additionally, that any gaps or limitations in a proposed expert witness' knowledge or qualifications are relevant to the weight to be given to the witness' testimony and not to the testimony's admissibility. *McPeak v McPeak*, 233 Mich App 483, 493; 593 NW2d 180 (1999); *Woodruff v USS Great Lakes Fleet, Inc*, 210 Mich App 255, 260; 533 NW2d 356 (1995). However, this case involves not merely a "gap or limitation," but rather an actual lack of experience and knowledge on the relevant issue in dispute thereby rendering Rees unqualified to opine on Mamroctski's cause of death.

The record reveals that Dr. Rees is a plastic surgeon and specializes in wound care. Dr. Rees is not an expert in pathology and did not participate in Mamroctski's autopsy or in the preparation of the death certificate. Dr. Rees conceded that he does not hold himself out to be an expert in heart trauma or heart failure and when treating patients with cardiovascular problems in his own practice, he always consults with a board certified cardiologist to determine proper treatment or surgical methods for those patients because he is not qualified to perform a cardiac evaluation. Dr. Rees admitted to treating Mamroctski only for a debrided ulcer and to diagnosing that the only foreseeable risk to Mamroctski was the threat of more sores. Dr. Rees neither monitored Mamroctski's heart nor treated Mamroctski for any heart conditions. In fact, Dr. Rees ultimately conceded that he was unable to definitively say whether Mamroctski's dilated cardiomyopathy was caused by paralysis or obesity.

The trial court properly considered the information presented on Dr. Rees' background, qualifications, and history with Mamroctski and determined that the requisite standard of reliability had not been met for the admission of the proposed medical testimony. *Spect Imaging, Inc, supra*, 246 Mich App 578-579. Because plaintiffs could not show that Dr. Rees' general background, training, or experience as a plastic surgeon qualified him to render an opinion on cause of death due to heart failure, we find that the trial court did not err in refusing to admit Dr. Rees' testimony on cause of death on the basis that it exceeded the scope of the witness' expertise. *Mulholland, supra*, 432 Mich 406.

Plaintiffs also argue that the circuit court abused its discretion by restricting plaintiff's counsel's examination of Terry Clay. A trial court's evidentiary rulings are reviewed for an abuse of discretion. *Allen v Owens-Corning Fiberglass Corp*, 225 Mich App 397, 401; 571 NW2d 530 (1997). The decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent a clear abuse of discretion. *Chmielewski v Xermac, Inc*, 457 Mich 593, 614; 580 NW2d 817 (1998).

Generally, all relevant evidence is admissible. Relevant evidence is evidence having any tendency to make the existence of a fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. MRE 401. The trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *Lewis v LeGrow*, 258 Mich App 175, 200; 670 NW2d 175 (2003).

Plaintiffs argue that a line of questioning directed toward Clay during trial would have revealed an issue of evidence destruction by the defense and that the circuit court abused its discretion by limiting plaintiffs' direct examination of Clay. At trial, Clay testified that Rock-Way maintained a protocol for issuing maintenance requests and drivers' logs indicating the

tractors and trailers drivers were assigned. Thereafter, plaintiffs' counsel then asked Clay whether he retained an attorney to represent him in this lawsuit. The defense objected and plaintiffs argued that their line of questioning directly related to an issue of evidence destruction by defendants. The circuit court sustained defendants' objection on the grounds of relevance.

The record indicates that Rock-Way, through its president, Joseph Plozai, denied the existence of any maintenance records for the tractor-trailer used by Dunkley during the accident under oath prior to trial and that the trial court denied plaintiffs' motion to compel production of documents relating to any purported destroyed records Plaintiffs do not demonstrate how this line of questioning of Clay has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. MRE 401. Further, we are satisfied that the court's limitation of cross-examination had no effect on the jury's verdict.

Since plaintiffs failed to provide the trial court with insight regarding how Clay's pre-trial communications with defense counsel would have made any relevant fact in this case more or less likely to be true, the trial court properly exercised its discretion in limiting plaintiffs' direct examination of Clay to relevant evidence. Because the trial court did not abuse its discretion, we will not disturb the trial court's ruling. *Chmielewski, supra,* 457 Mich 614.

Plaintiffs assert that the circuit court abused its discretion by denying the jury the opportunity to rehear the testimony of eyewitness Hollandsworth. The trial court's refusal of a jury's request to be provided with transcripts is within the trial court's discretion. *People v Crowell*, 186 Mich App 505, 508; 465 NW2d 10 (1990), remanded on other grounds 437 Mich 1004 (1991); see also *Klein v Wagenheim*, 379 Mich 558, 561; 153 NW2d 663 (1967); *Federoff v Meyer Weingarden & Sons, Inc*, 60 Mich App 382, 388-389; 231 NW2d 417 (1975).

When addressing a jury's request to rehear testimony, the trial court "must exercise its discretion to assure fairness and to refuse unreasonable requests." *People v Howe*, 392 Mich 670, 676; 221 NW2d 350 (1974). "As a general rule, when a jury requests that testimony be read back to it, both the reading and the extent of the reading are matters within the sound discretion of the trial judge." *Whitney v Day*, 100 Mich App 707, 712; 300 NW2d 380 (1980), citing *Howe, supra*, 392 Mich 675. In the analysis of an abuse of discretion, we are mindful of the corollary rule in the rules of criminal procedure found at MCR 6.414(H). While a trial court may order the jury to continue deliberations without the requested review, it may not indicate that the possibility for review in the future is completely foreclosed. MCR 6.414(H); *People v Smith*, 396 Mich 109, 110-111; 240 NW2d 202 (1976). The reasoning of MCR 6.414(H), although a rule of criminal procedure, is equally applicable in this civil action, and is certainly the methodology followed by the trial court in addressing the jury's request. In other words, after continued deliberation if the jury still needs a copy of the transcript to reach a decision and providing the transcript will not violate a sense of fairness and is otherwise not unreasonable, the transcript should be provided. MCR 6.414(H).

After deliberating for approximately one hour, the jury requested Hollandsworth's trial testimony as well as her deposition testimony. Defendants argued that the transcripts should not be provided because the deposition testimony contained inadmissible hearsay and the trial transcripts should not be provided because the jury should attempt to rely on its collective memory. Plaintiffs stated that both Hollandsworth's trial and deposition testimony should be

provided to the jury. Plaintiffs' counsel stated that he was "not so sure it's hearsay" but when asked by the trial court for an exception to the hearsay rule under which the deposition testimony could be admitted plaintiffs' attorney could not provide one.

Immediately after the court heard arguments presented by both parties, the jury was brought back into the courtroom where the trial court instructed it as follows:

> You requested the testimony and deposition of Donna Hollandsworth. What I'm going to do is re-instruct you to rely on your collective memories of her testimony here. If it becomes impossible to proceed without reading her testimony, we will give you a copy of it, so I'm sure you'll let us know if it becomes impossible to proceed without hearing that testimony. And it's unlikely that you'll be able to see the deposition testimony, so you may return to the jury room to continue deliberating.

After reviewing the above instructions, we find that the trial court did not abuse its discretion when it denied the jury's request to rehear Hollandsworth's testimony. *Crowell, supra*, 186 Mich App 508. It was within the trial court's discretion to instruct the jury to rely on their collective memories. *Whitney, supra*, 100 Mich App 712. Further, the trial court's comments were not unreasonable and did not completely foreclose the possibility of future review of the trial transcripts or even the deposition transcripts although the trial court stated that review of the deposition transcripts would be unlikely. MCR 6.414(H); *Smith, supra*, 396 Mich 110-111. The trial court indicated to the jury that the testimony would be provided as a last resort if it would be impossible for the jury to proceed deliberating without it. These instructions met the requirements established in MCR 6.414(H). Given the early state of the deliberations, the jury's apparent resolution by not renewing the request, and the discretionary nature of this kind of ruling, we finds no grounds for reversal. Accordingly, we find that plaintiffs failed to establish an abuse of the trial court's discretion. *Crowell, supra*, 186 Mich App 508.

Finally, plaintiffs argue that the circuit court abused its discretion in denying plaintiffs' motion for additur. This Court reviews the trial court's decision on a motion for additur or, in the alternative, a new trial, for an abuse of discretion. *Hill v Sacka*, 256 Mich App 443, 460; 666 NW2d 282 (2003). To make this determination, the trial court must objectively consider the evidence presented as well as the conduct of the trial. *Palenkas v Beaumont Hospital*, 432 Mich 527, 532; 443 NW2d 354 (1999). When reviewing a motion for additur, the appropriate consideration is whether the evidence supports the jury's award. *Setterington v Pontiac General Hospital*, 223 Mich App 594, 608; 568 NW2d 93 (1997). The trial court may grant a new trial whenever a party's substantial rights have been materially affected, such as where the jury's verdict was clearly or grossly inadequate. MCR 2.611(A)(1)(c) and (d).

The adequacy of amount of a verdict is generally a matter for the jury. *Kelly v Builders Square, Inc*, 465 Mich 29, 35; 632 NW2d 912 (2001). This Court will not substitute its judgment on this question unless a verdict has been secured by improper methods, prejudice, or sympathy. *Id.* This Court upholds verdicts if there is an interpretation of the evidence that provides a logical explanation for the findings of the jury. *Bean v Directions Unlimited, Inc*, 462 Mich 24, 31; 609 NW2d 567 (2000). Awards for personal injury, pain and suffering in particular, rest within the fact finders' sound discretion. *Meek v Dep't of Transportation*, 240 Mich App 105, 122; 610 NW2d 250 (2000).

The Michigan Supreme Court has articulated an objective basis to evaluate a request for additur or a new trial. The Court in *Palenkas, supra*, articulated the following factors when considering such a request:

> (1) the verdict is not supported by the evidence introduced at trial;
>
> (2) the verdict is the result of improper methods, prejudice, passion, partiality, sympathy, or a mistake of law or fact;
>
> (3) the verdict is outside the limits of what reasonable minds would deem just compensation for the injuries sustained; or
>
> (4) the amount awarded deviated from comparable awards in similar cases within the state and in similar jurisdictions. [*Palenkas, supra,* 432 Mich 531-532, 537-538.]

In applying the *Palenkas* factors to the operative facts of this case, we find that plaintiffs have failed to satisfy any of the *Palenkas* factors, and have not produced the kind of objective criteria required to support their request for additur.

First, the jury was in the best position to hear and assess Mamroctski's injuries, complications, the medical procedures he underwent, and any pain and discomfort he sustained. A trial court is entitled to considerable deference on appeal, having had the opportunity to evaluate the jury's reaction to the witnesses and other proofs, the trial court stands in the best position to consider the merits of a motion to adjust the jury's award of damages. *Palenkas, supra*, 432 Mich 533-534. Plaintiffs presented a plethora of testimonial as well as other evidence relating to plaintiffs' injuries and attendant damages. The jury was free to accept or reject any or all of the evidence presented pertaining to damages. *Kelly, supra*, 465 Mich 34, citing *Joerger v Gordon Food Service, Inc*, 224 Mich App 167, 172-173; 568 NW2d 365 (1997). In fact, there is no legal requirement that a jury's finding of liability necessitates an award of damages. *Joerger, supra*, 224 Mich App 173. After reviewing the record, mindful of the fact that the adequacy of the amount of the verdict is a matter for the jury, we conclude that there is an interpretation of the evidence that provides a logical explanation for the findings of the jury, and will not disturb the jury award. *Kelly, supra*, 465 Mich 29; *Bean, supra*, 462 Mich 31.

The second factor articulated by *Palenkas* does not apply to this case because plaintiffs do not assert that the verdict was a result of impropriety, prejudice, or mistake. Plaintiffs offer no reason for concluding that the verdict is the result of prejudice, partiality, passion or sympathy.

Third, this Court must again give deference to the fact-finder's discretion in assessing just compensation. The jury assessed all the evidence presented by plaintiffs supporting their claim, including myriad evidence highlighting Mamroctski's injuries, the extent of his medical care, and his pain and suffering. Plaintiffs present no objective basis from which this Court can properly conclude that a verdict of $155,000 is outside the limits of what reasonable minds would deem just compensation for the thirteen months between the accident and death. Plaintiffs have offered this Court no support for the assertion that the jury did not act reasonably in contravention of *Palenkas*.

Fourth, plaintiffs have not shown that the amount awarded deviated from comparable awards in similar cases within the state and in similar jurisdictions. Plaintiffs direct us to three circuit court cases, but fail to provide any analysis regarding how the award in the case at bar is similar to, but deviates from, those awards. Plaintiffs have not supported their claim by identifying and examining similar factual scenarios and comparing and contrasting the factors that may have been involved in the damages analysis, for example, age or wage history of the plaintiffs or any breakdown of economic/non-economic or past/future damages. Due to the dearth of analysis offered regarding plaintiffs' claimed deviation from comparable awards, we cannot conclude that the trial court abused its discretion in denying plaintiffs' motion for additur or a new trial.

Defendants' cross-claim is moot in light of our resolution of plaintiffs' issues, and thus we decline to reach it.

Affirmed.

/s/ Pat M. Donofrio
/s/ Helene N. White
/s/ Michael J. Talbot